87-1852

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSE A. LOPEZ, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

DO WARRANTLESS CANINE SEARCHES OF PRIVATE PREMISES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS?

In the present case, police officers made a forced entry into petitioner's motel room without a warrant, searched the room, located a locked suitcase and subjected it to a canine search. Based upon the canine's positive response, a warrant was obtained. The locked suitcase was forced open and cocaine was discovered within.

The question presented for review is whether, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, police officers may bring a drug sniffing dog into private premises without a warrant and without consent in an attempt to obtain incriminating evidence therein.

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IN THE
SUPREME COURT OF THE UNITED STATES
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JOSE A. LOPEZ, JR.,
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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI
TO THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

The petitioner, Jose A. Lopez, Jr., respectfully prays that a Writ of Certiorari issue to review the Opinion of the First District Court of Appeal for the State of Florida entered in this action on February 19, 1988, rehearing denied March 28, 1988.

OPINION BELOW

The opinion of the First District Court of Appeal for the State of Florida is unreported and is attached hereto as Appendix A. The written opinion of the

trial court below is also unreported and is attached as Appendix C.

JURISDICTION

The opinion of the First District Court of Appeal for the State of Florida was entered on February 19, 1988. (See, Appendix A). A timely motion for rehearing and rehearing en banc was denied on March 28, 1988, and the order denying same is attached as Appendix B. Pursuant to Fla.R.App.P. 9.030(a)(2), attached as Appendix D, as construed by the Supreme Court of Florida there is no right of review to that Court where, as in this case, the court of appeal issues a per curiam affirmance. Davis v. Mandau, 410 So.2d 915 (Fla. 1981); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires enforcement of the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also requires application of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts of this case are unusual but not complex. On Monday, February 9, 1987,

in Jacksonville, Florida, members of the Jacksonville Sheriff's Office arrested an individual named Miguel Munoz for possession of cocaine, shortly after he attempted to sell it to the officers. Upon arresting Mr. Munoz, a search of his trousers revealed a slip of paper with the numbers "264-0511" and "154" written on it. Printed across the top of the paper were the words "Orange Park." Orange Park is a small suburban community located in a different county approximately 17 miles from Jacksonville, the scene of Mr. Munoz's arrest. After seeing the paper, one of the officers determined that the number "264-0511" was listed to the Scottish Inn Motel in Orange Park, Florida and the decision was made to drive to Orange Park and go to Room 154 of the Scottish Inn.

At approximately 4:30 p.m., the officers, now joined by members of the Orange Park Police Department met in front of the Scottish Inn Motel and devised a

plan to enter into Room 154. One of the officers requested to see the registration records for Room 154 and the desk clerk allowed him to do so. The records showed that Room 154 was rented to one Omar Simon, 1/ who was driving a 1983 Pontiac, Florida tag ZGA-94M. The officers obtained a pass key, and went to Room 154. No effort was made to secure a warrant.

Upon proceeding to the room, uniformed officers knocked on the door, so "if anybody opened the door inside, from outside, they would recognize them as being police." There is no evidence in the record that any of the officers announced their identity or purpose prior to their entry into the motel room.

1/ The record indicates that appellant used the names Jose Lopez and Omar Simon.

Petitioner opened the motel room door upon the officers knocking on it. Prior to the door being opened, the officers heard no noises from within the motel room, nor was there any delay in the opening of the door. Immediately upon the door being opened, two of the officers held their gun toward petitioner and told him to back up against the wall and at least five police officers entered the room.

Mr. Lopez was immediately searched by one officer, while other officers entered his room and checked to see if anyone else was within. A pistol, later determined to have been legally possessed by petitioner, was located. He was immediately arrested for possessing the firearm and was handcuffed. A locked suitcase was located in the bathtub and was seized by the officers and moved to the living area. At no time did petitioner consent to the seizure of the suitcase.

Not stopping to obtain a search warrant, a drug detection dog was brought into petitioner's room to sniff the suitcase. Although the record is not clear as to the amount of time which elapsed before the dog arrived, one officer testified that he was able to answer another call and return in time to witness the dog arrive. He estimated he was gone somewhat less than an hour.

The dog sniffed the suitcase and petitioner's vehicle located in the motel parking lot for the presence of drugs. During these searches, Mr. Lopez's suitcase was moved to the foot of the bed on the floor by the officers and the dog was walked around the room. The dog alerted positively to the suitcase. At this point in time, the decision was made to obtain a search warrant for the car and suitcase. The sole probable cause asserted in support of issuance of the search warrants for

these items was that the dog had alerted positively to the suitcase and vehicle.

Estimating the amount of time which elapsed before other officers returned with the search warrant, one officer stated, "After some while after that, seemed like a considerable amount of time, Porter and Clark [the officers] came back with a search warrant." (emphasis added).

Upon prying the locked suitcase open with a screwdriver, the officers discovered cocaine. In all, several hours elapsed from the time appellant's suitcase was seized until a warrant was obtained to search it.

Counsel for Mr. Lopez, pursuant to Fla. R. Crim. P. 3.190(h) filed a motion to suppress evidence seized from the vehicle and suitcase. After an evidentiary hearing, the trial judge suppressed all evidence seized from the vehicle, but refused to suppress fruits of the motel room search. The judge found the initial

entry to be lawful due to exigent circumstances, namely the presence of drugs within the motel room. He nonetheless was troubled that the canine search occurred without a warrant, stating in his written opinion:

> The question that has bothered the court throughout this is: Where did Luke come from? What right did the police have to bring a drug dog in a room they had no right to search but only a right to secure pending a search warrant?
>
> So the question is: Does the bringing of Luke into the room to see if there is contraband in that room constitute a search prior to issuance of the search warrant?
>
> . . . .
>
> The court can find no reason for the police bringing Luke to Room 154.
>
> . . . .
>
> ...[T]hey secured it [the motel room] for the purposes of searching and it seems to me that when they brought Luke into the room that they did search it.

(emphasis added).

Although he found the use of the dog "inappropriate," the judge concluded that

the subsequent search of the suitcase was lawful because it occurred after a search warrant was obtained.

The order denying petitioner's motion to suppress the contents of the suitcase was challenged by petitioner on appeal to the First District Court of Appeal for the State of Florida. Although this case was one of first impression for that court, it did not issue a written opinion, but instead issued a per curiam affirmance, a procedure typically utilized where the issue presented has previously been addressed and determined by prior case law. The lawfulness of the warrantless use of a canine search within the confines of one's residence has never previously been determined by any Florida court or by this Court.

Due to the broad impact of the per curiam affirmance, petitioner sought, but was denied, rehearing and rehearing en

banc. Petitioner now seeks review in this Court.

This petition squarely raises the issue of whether dogs trained to sniff contraband may be brought into an individual's private premises without a warrant so that police officers may obtain evidence in support of a warrant to further search those premises.

SUMMARY OF THE ARGUMENT

The decision below is in clear conflict with decisions from this Court as well as decisions from the Second and Ninth Circuits. The Second and Ninth Circuits have explicitly held that, within private premises, a canine sniff constitutes a search which, in the absence of a warrant, violates the Fourth Amendment. Other circuits have recognized a right of privacy for individuals occupying a motel room, as has this Court.

Significantly, in the present case the dog was not used outside the motel room to

detect cocaine within, but rather, was in a position to sniff petitioner's locked suitcase solely as the result of the warrantless and forced entry in petitioner's motel room. This conduct was in clear violation of this Court's decision in Payton v. New York, 445 U.S. 573 (1980).

In addition, the prolonged detention of petitioner's luggage prior to the issuance of a warrant to its search was unreasonable in light of this Court's decision in United States v. Place, 462 U.S. 696 (1983). The court's ruling below is in direct conflict with the Place decision.

Accordingly, this Court should accept jurisdiction in this cause in order to maintain uniformity with its previous decisions in Payton and Place, and to set reasonable guidelines for the use of canine searches within private premises.

ARGUMENT

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION AND THE DECISIONS OF NUMEROUS COURTS OF APPEAL.

The warrantless use of drug sniffing dogs is controversial. In the present case, this controversy raises an issue not yet determined by this Court, namely, whether police officers may make a forced and warrantless entry into private premises to subject articles within it to a warrantless canine search. All of the federal courts of appeal that have determined this issue have condemned such practice. This Court should accept jurisdiction of the present case to determine whether police officers must obtain a warrant to subject private premises to a canine search.

In United States v. Place, 462 U.S. 696 (1983), this Court approved the warrantless use of drug sniffing dogs to

sniff luggage "...located in a public place." Id. at 707 (emphasis added). In doing so this Court specifically held:

> The purpose of which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to a sniff test - no matter how brief - could not be justified on less than probable cause.

Id. at 706 (emphasis added). 2/

In Place, this Court went on to conclude that the ninety-minute detention of the defendant's luggage constituted a

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2/ See also, 1 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 2.2(f) (2d ed.) "It is extremely important to recognize that the Place holding does not validate the use of drug detection dogs in all circumstances...[I]f an encounter between the dog and a person or object is achieved by bringing the dog into an area entitled to Fourth Amendment protection, that entry is itself a search subject to constitutional restrictions."

seizure, which under the facts of that case, was not supported by probable cause, this Court noting, "There is no doubt that the agents made a 'seizure' of Place's luggage when, following his refusal to consent to a search, the agent told Place that he was going to a federal judge to secure issuance of a warrant." Id. at 707.

In the present case, following the forced and warrantless entry into petitioner's room at gunpoint, his room was searched and his luggage seized from the bathtub and removed to the living area. Only after this warrantless entry and seizure did the canine search occur. In all, several hours elapsed between the detention of petitioner and his luggage and the actual issuance of a search warrant for the suitcase. Thus, the decision below affirming the denial of petitioner's motion to suppress is in express and direct conflict with this Court's decision in Place because no warrant was obtained prior

to the seizure and detention of Mr. Lopez's suitcase.

The decision below is also directly contrary to the decisions in United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985) and United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985). In Thomas, a case directly on point, although somewhat less egregious because the detecting canine was located outside the apartment, the United States Court of Appeal for the Second Circuit held that, within private premises, a dog sniff constitutes a search which, in the absence of a warrant, violates the Fourth Amendment. In doing so, the Thomas court explicitly rejected the warrantless use of a canine to sniff the interior of an apartment. The Thomas court distinguished cases holding canine sniffs permissible in public airport surveillances. Specifically, it held:

> It is one thing to say that a sniff in an airport is not a search, but quite another to say

that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

. . . .

[A] practice that is not intrusive in a public airport may be intrusive when employed at a person's home. Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, see, United States v. Place, 103 S.Ct. at 2644, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be sensed from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.

. . . .

Because of defendant Wheelings' heightened expectation of privacy

> inside his dwelling, the canine sniff at his door constituted a search. As the agent had no warrant, the search violated the Fourth Amendment. Hence, we conclude that the information gathered from the dog's alert may not properly be used to support the issuance of the search warrant of Wheelings' apartment.

Id. at 1366-1367 (emphasis added) (emphasis in original).

Similarly, in United States v. DiCesare, supra, a case directly contrary to the decision herein, the Ninth Circuit addressed the propriety of acquiring probable cause with a trained dog after seizure of private premises. In that case, the officers were admitted to defendant's apartment, secured the premises, and called for a narcotics canine. Id. at 898. The dog alerted to a suitcase in the living room and a search warrant was obtained based on that alert. Id.

The court held that the police did not have probable cause to obtain a search warrant, and could not use the dog to

obtain further evidence to establish probable cause for a warrant. Id. It further warned against dangers of unrestricted use of canine searches:

> If we upheld the admissibility of this evidence, we would encourage police to seize private dwellings without probable cause, then to bring in trained dogs to locate contraband in order to obtain the probable cause necessary for a warrant.

Id. at 899. The court concluded, "Officers cannot seize a dwelling to find probable cause -- first they must have probable cause to seize a dwelling." Id.

Concurring with the majority opinion, Circuit Judge Reinhardt expressed his concern over the growing trend of the warrantless use of canines within private residence:

> The question is-can we be forced to allow large police dogs to come into our homes and do whatever large police dogs do? The intrusion of these dogs is offensive to some, frightening to others, and, sadly, to at least a few, reminiscent of the ugliest types of scenes that have occurred in police states. It is

> hardly the sniff of a suitcase that is at issue. It is first and foremost the unwanted and unwelcome presence of an animal in the privacy of our homes, an animal intruder that our law enforcement authorities tell us is simply another government agent.
>
> . . . .
>
> History is replete with incidents in which dogs, acting as instruments of the state, have invaded people's rights in furtherance of the state's interest. In the antebellum South, dogs were used to ferret out blacks who sought little more than the same free society that the fourth amendment protects. During World War II, dogs were used in Nazi Germany to help locate Jews so that they could become a part of Hitler's 'Final Solution'. Although the state of affairs has changed somewhat since these events transpired, the image of the police state is as clear now as it was then. I cannot believe that, except in the most compelling and extraordinary circumstances, our free society would be willing to tolerate the forced entry of dogs into private homes for purposes of law enforcement-and certainly not in order to seek out contraband or fugitives.

Id. at 901-902.

The California courts have likewise resolved this issue in petitioner's favor.

See e.g., People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (Cal. 5th DCA 1977) (warrantless canine sniff of miniwarehouse compartments illegal). Indeed, counsel for petitioner has located not one case which has upheld the use of trained dogs to sniff private dwelling places in the absence of a search warrant. 3/ Sensory enhancement techniques that intrude into the privacy of the home, and by extension, into private motel rooms, have been consistently condemned as violative of the Fourth Amendment. United States v. Knotts, 460 U.S. 276 (1983). The ruling to the contrary in the instance case is in clear conflict with well-established authority.

3/ In fact, the very same court which issued a per curiam affirmance of the denial of petitioner's motion to suppress, recently issued a per curiam affirmance of the granting of a motion to suppress under identical facts. State v. Yollette Mira, ___ So.2d ___, App. No. 87-922 (Fla. 1st DCA April 20, 1988) (unpublished per curiam affirmance).

Of equal importance, the decision below conflicts with a long line of cases which prohibit police entry into private premises without warrant. Beginning with this Court's decision in Payton v. New York, 445 U.S. 573 (1980), the law has been clear that evidentiary items obtained as the result of an unlawful entry must be suppressed. Since Payton, and accordance with this Court's decisions in Hoffa v. United States, 385 U.S. 293, 301 (1966); Stoner v. California, 376 U.S. 483, 489-490 (1964); and Lanza v. New York, 370 U.S. 139, 143 (1962), numerous federal courts of appeal have applied this principle to situations where a warrantless entry is made into a lawfully occupied motel room. See e.g., United States v. Newbern, 731 F.2d 744 (11th Cir. 1984); United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983); and United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982).

The use of a drug sniffing canine in the present case was accomplished solely as the result of the warrantless and unlawful entry into petitioner's motel room. Without such entry, no canine sniff could have occurred. Accordingly, the canine sniff should have been suppressed as illegally tainted fruits of the warrantless entry. The decision below to the contrary is in direct conflict with the Payton decision and its progeny.

CONCLUSION

The opinion of the First District Court of Appeal below is in direct conflict with authority from this Court and also conflicts with decisions of federal circuit courts of appeal. The issue raised herein is one of great public importance. Petitioner respectfully prays this Court to accept jurisdiction in this cause and to reverse the decision of the court below to the extent it authorizes the warrantless entry into private premises for the purpose

of using a dog to sniff items within the premises.

Respectfully submitted,

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By: Elizabeth L. White
Elizabeth L. White

By: _____
Wm. J. Sheppard

Attorneys for Petitioner
Duval County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this 5th day of May, 1988 by first class United States mail upon the following:

Robert A. Butterworth, Esq.
Attorney General
Department of Legal Affairs
The Capitol
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Royall P. Terry, Jr., Esq.
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Fl. 32399-1050

Elizabeth L. White
ATTORNEY

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSE A. LOPEZ, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

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ATTORNEYS FOR PETITIONER

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IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

VICTOR TITTLE, a/k/a JOSE ANTHONY LOPEZ, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 87-799

Opinion filed February 19, 1988.

An Appeal from the Circuit Court for Clay County. Lamar Winegeart, Judge.

William J. Sheppard and Elizabeth L. White of Sheppard and White, Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General; Royall P. Terry, Jr., Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

SMITH, C.J., ERVIN AND NIMMONS, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6152

March 28, 1988

CASE NO: 87-00799
LT NO: 87-171-CF

Jose A. Lopez, Jr. vs State of Florida

Appellant/Petitioner Appellee/Respondent

ORDER

Motion for rehearing and rehearing en banc DENIED

By order of the Court

RAYMOND E. RHODES
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

cc:

William J. Sheppard Royall P. Terry, Jr.
Elizabeth Louise White

Deputy Clerk

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR CLAY COUNTY, FLORIDA

CASE NO.: 87-171 CF

STATE OF FLORIDA

vs.

VICTOR TITTLE, a/k/a
JOSE ANTHONY LOPEZ, JR.,

Defendant.

O R D E R

THIS CAUSE came on to be heard upon the Defendant's Motion to Suppress statements and evidence found in Room 154 of the Scottish Inn, Orange Park, Florida, and the Court having heard testimony and argument of counsel, finds as follows:

The Jacksonville Sheriff's Office Strategic Investigation Section, whose nickname I suppose would be "The Big Time Drug Squad," is composed primarily of police officers and some other persons who usually work in drug dealings. Said investigative section had been working to

set up a buy from a man named Munoz. The buy was to go down at the Ramada Inn located at the intersection of I-295 and Lane Avenue, in the City of Jacksonville.

Officer Porter, who was the Affiant in the Affidavit and principal witness for the State at the hearing, was assigned to work with the officers who had set up the buy in Jacksonville at the Ramada Inn. His function was to observe the person who would come to that Ramada Inn and attempt to follow him and to protect his fellow officers. They were in communication by radio.

Pursuant to that, he took up a position where he could observe the entrance of that Ramada Inn and Munoz showed up and met the officers inside the Ramada Inn.

When he exited, Investigator Porter, as was his job, attempted to follow this suspect.

He followed him down Interstate 295 in a southerly direction until he got to the intersection of U.S. 17, which is just inside Clay County, Florida. When you exit, you're in Clay County, I'll put it that way.

Officer Porter, I guess the best way to describe it, was performing a very loose surveillance of that car and lost him at that intersection.

He testified that for several minutes he looked around the intersection which contained several motels and he named the ones he looked at. He did not see the car he had been following. Therefore, he re-entered I-295 heading in a northerly direction and was returning to the Ramada Inn at the intersection of I-295 and Lane Avenue, in the City of Jacksonville, Duval County, Florida.

While proceeding to do that, he again came upon the vehicle he had followed in a

southerly direction on I-295, losing it at the intersection I-295 and U.S. 17.

He proceeded again to follow that car to the Ramada Inn where he saw the occupant of that car exit the vehicle with, I believe his description was, a short jacket or something, and placing something in it and holding it at the bottom, going to the Ramada Inn.

Subsequently, by radio, he learned that the officers in the Ramada Inn had taken down the person who he followed (by taking down, I mean, arrested) and recovered from him one kilo of cocaine and a pistol.

The officer who had been dealing with the suspect they now had under arrest informed Officer Porter that it was an eight kilo deal and that this first kilo was a test run and the others would be delivered not in bulk but two at a time by this same Munoz who he had followed.

Upon searching Munoz at his arrest, they found a slip of paper that contained an obvious telephone number by the number of digits, and the numbers "154" with no other notation on that slip of paper.

By calling the number that was an obvious telephone number, the officers established that it was the telephone number of the Scottish Inn located at Orange Park, Clay County, Florida, at the intersection of I-295 and U.S. 17.

Detective Porter testified he then assumed the "154" was a room number at that motel. He proceeded to Clay County after asking his Com Room to have the Orange Park police officers meet him at the City Limits. I think they met at the Omelet House or some place in the same vicinity of the Scottish Inn, and Detective Porter advised them of the above facts and asked them to assist him in furthering the police work.

In furtherance of that, they contacted the registration desk of the motel and found that Room 154 was occupied as shown by the registration form, which is Defendant's Exhibit 1, by one Omar Simon with a Homestead, Florida, address. Officer Porter testified he believed that the motor vehicle license number to be the same as the motor vehicle license number that he had been following.

Upon securing the services of two uniformed policemen, the entourage proceeded to Room 154 of the Scottish Inn Motel where the defendant in this case was registered under the name of Omar Simon. It has now been established that the defendant's true name is Victor Tittle.

The officers then arrested the defendant for Carrying a Concealed Firearm when they found a gun contained in an ankle holster the defendant was wearing. It is agreed that this charge would not be a sustainable arrest, but the officers did

advise the defendant of his Miranda rights at the time the arrest was made.

At that point in time, they testified they began to look for an Assistant State Attorney to obtain a search warrant. They did continue on after other officers arrived, one of whom brought the drug dog, Luke, with him. Officer Porter testified that he was present at the time Luke arrived.

The court subsequently issued a search warrant that allowed police to search room 154 entirely and did not delineate the suitcase as an item to be searched, but delineated the room, and the goods to be found, or what they were allowed to search for and seize, was cocaine.

The court finds that Officer Porter knew at the time he left the Ramada Inn in Jacksonville, Florida, the second time, that is after the first bust had gone down, the recovery of the paper and all, that at that point in time, Officer Porter had

probable cause to obtain a search warrant for room 154, provided it was occupied.

Having said that, the question is: Did Officer Porter have such exigent circumstances to secure that room until such time as a search warrant could be obtained?

From the totality of his knowledge, that is: One: It was an eight kilo drug deal; and, Two: From Officer Porter's experience, it was indicated they were knowledgeable drug dealers from the method and sophistication of the transfer of the kilo for the cash. By setting up the deal in that method and manner, the remaining contraband could either be destroyed or flight could occur if a certain time lapse was greater than expected.

Counsel argues you can't destroy seven kilos of cocaine, but I can't understand why you can't. It's a powder and flushes down the toilet.

From Officer Porter's experience at that point in time and with what he knew, the court finds he did have exigent circumstances to secure room 154 at the Scottish Inn, Orange Park, Florida.

The defendant was given his Miranda warnings upon entrance to the room.

Although the arrest was not a legal arrest, the police would have been required to give the defendant his Miranda warnings without an arrest. Miranda warnings having been given, the defendant having subsequently made statements without request of counsel, and the court finding the police had the right to enter the room, there would be no basis to suppress those statements made by the defendant to the police at that time.

Now, the point that concerns the court more than that is the point raised by counsel of whether the warrant itself should have been limited to the suitcase and whether it was improper to consider the

alert of Luke on the suitcase in issuing the search warrant.

The question that has bothered the court throughout this is: Where did Luke come from? What right did the police have to bring a drug dog in a room they had no right to search but only a right to secure pending a search warrant?

So the question is: Does the bringing of Luke into the room to see if there is contraband in that room constitute a search prior to issuance of the search warrant?

And, secondly, was the magistrate in error in issuing the warrant for the entire room; and, if they had that right, was the magistrate in error in issuing the warrant for room 154, Scottish Inn, rather than the suitcase that had been alerted to by Luke in room 154?

The court can find no reason for the police bringing Luke to room 154.

I think the police in this case had done an excellent piece of police work and

the way the thing went down, I think they had every right to secure the room. In fact, they would have been derelict in not securing it. But, they secured it for the purposes of searching and it seems to me that when they brought Luke into the room that they did search it.

Now, they did not search the suitcase until after the issuance of the warrant. So the court finds that although the police inappropriately brought the dog, Luke, in to assist them, once the dog alerted, they did not search, and the court further finds that the search warrant then having been issued for room 154 would encompass the suitcase as it was. The warrant was restricted to search for cocaine, no other drugs. Nothing else. Just cocaine.

Therefore, it is

ORDERED that Defendant's Motion to Suppress the seven kilos of cocaine and statements made by the defendant after the Miranda warnings is hereby denied.

Green Cove Springs, Florida. July 8, 1987.

LAMAR WINEGEART, JR.
CIRCUIT JUDGE

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FLORIDA RULE OF APPELLATE PROCEDURE
9.030(a)(2)

Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of districts courts of appeal that:

(i) expressly declare valid a a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decision of other district courts of appeal.

(2)

No. 87-1852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSE A. LOPEZ, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

DO WARRANTLESS CANINE SNIFFS OCCASIONED BY OFFICERS LAWFULLY INSIDE PREMISES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS? (Restated)

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The respondent, the State of Florida, opposes issuance of a writ of certiorari to review the opinion of the First District Court of Appeal for the State of Florida entered in this action on February 19, 1988, rehearing denied March 28, 1988.

JURISDICTION

Petitioner incorrectly invokes the jurisdiction of this court, citing 28

U.S.C. §1254(1). This citation is inapposite and irrelevant but respondent concedes that this court could grant certiorari pursuant to the provisions of 28 U.S.C. §1257(3).

STATEMENT OF THE FACTS

On Monday, February 9, 1987 in Jacksonville, Florida, deputy sheriffs were involved in an undercover drug buying operation. They were ensconced in a Ramada Inn motel in Jacksonville. Arrangements had been made to purchase cocaine from one Miguel Munoz, a kilo or two at a time, in quick succession contingent upon payment for each delivery at the officers' motel room until eight kilos had changed hands. When Munoz delivered the first kilo of cocaine he was arrested and scribblings on a piece of paper taken from his trousers incidental to the arrest

revealed the phone number of the Scottish Inn motel in Orange Park, 17 miles away, in a neighboring county and a three-digit number which the officers correctly reasoned was a room number. Munoz had been tailed by Deputy Porter from the vicinity of the Scottish Inn in Orange Park to a point where he was seen entering the Ramada Inn where the undercover officers were waiting. After Munoz was arrested there with a kilo of cocaine in his jacket, Porter was advised concerning the newly discovered information, relative to the Scottish Inn in Orange Park.

Had Munoz not been arrested, the arrangement was for him to proceed back to his stash and obtain the next increment of cocaine, deliver it and collect the money from the buyers as he would have done respecting the first increment. Because Munoz was now out of

circulation the police became concerned that whomever was guarding the stash of cocaine in Orange Park would grow uneasy and probably flee after disposing of the remaining seven kilos by flushing them down the toilet in the motel room. Consequently, Porter was directed to proceed to the Scottish Inn in Orange Park and secure the premises before any of this could happen. He obtained the assistance of uniformed officers from the City of Orange Park and proceeded to the motel. Room 154, the room number written on the piece of paper found in the possession of Munoz, was found to have been rented to one Omar Simon. Porter and the uniformed officers knocked on the door of room 154 and Jose Lopez, alias Omar Simon, alias Victor Tittle, answered the door. The uniformed officers immediately patted Lopez down for their own protection and

to determine if he was armed. Petitioner was wearing a .38 caliber pistol in a holster which was strapped to his ankle. Lopez was arrested and Mirandized immediately, but all of that is irrelevant to the petition as there were no testimonial fruits of consequence. Petitioner possessed identification credentials and a badge indicating that he was a member of the City of Miami Police Department. Lopez said that his name was Victor Tittle and that he was a native of New York. His Miami police identification indicated that his name was Jose Lopez, Jr. and that he had emigrated to the United States from Cuba in 1980. Lopez denied any knowledge concerning the suitcase in the bathtub. There was no search of the premises at this time, but the officers discovered the suitcase during a protective sweep of the motel room to

determine if there were any other persons inside, armed or otherwise.

After the premises were secured, enter Luke, the sniffer dog and his handler. The suitcase was moved from the bathtub to the bedroom in order to facilitate the sniff. Officer Bobby Deel, Luke's human partner, placed the suspect's suitcase in a line with several empty suitcases that Luke had never worked with and Luke alerted on petitioner's suitcase. As might be expected, petitioner had already denied any knowledge as to the contents of the suitcase. Detective Porter left and returned a couple of hours later with a search warrant. At that time the suitcase was opened and the expected seven remaining kilos of cocaine were found inside. Although the application for the search warrant included references to Luke's olfactory expertise

the trial court found that this was surplusage and that there had actually been no need to bring Luke into the operation. In other words, the trial court found that first, the Orange Park officers acted correctly in securing the premises after they determined that the room was occupied and second, based upon what they had learned thus far concerning the entire operation involving Munoz and now Lopez, there was probable cause that room 154 of the Scottish Inn in Orange Park, Florida was the "stash pad" for the remaining seven kilos of cocaine. Put still another way, the officers could have obtained a search warrant for room 154 for cocaine, without Luke's participation.

SUMMARY OF ARGUMENT

Initial entry into the motel room by uniformed officers was a result of peti-

tioner's answering the door. The premises were lawfully secured based upon exigent circumstances in order to prevent destruction of evidence and/or escape of law-breakers. If the police officers had a right to be on the premises then they had a right to have with them their sniffer dog and other police equipment and aids.

Luke, the sniffer dog, smelled the air molecules around a locked suitcase in petitioner's custody but no search was made until after the arrival of the search warrant. There was probable cause to obtain a search warrant with or without Luke's participation. The trial court acted correctly in refusing to grant petitioner's motion to suppress the cocaine that was seized incidental to execution of the search warrant.

ARGUMENT

DO WARRANTLESS CANINE SNIFFS OCCASIONED BY OFFICERS LAWFULLY INSIDE PREMISES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS? (Restated)

Respondent submits petitioner is wasting this court's time by creating what is really a bogus issue, a strawman, as it were, and then proceeding to argue the issue on its merits as if it had already been established that the issue was genuine. Respondent reiterates that Luke's role in this case is totally irrelevant in that there existed independent probable cause to support the issuance of a search warrant based upon what the officers knew even before they knocked on the door of room 154. The purpose of knocking on the door was to secure the premises and not to make a search. The officers might have put the search warrant proceedings in motion at any time but they were preoccupied with securing the premises. Once this was

accomplished they elected to have Luke do his thing before proceeding further. Perhaps this contributed slightly to the delay in obtaining the search warrant but because Luke's sniffing was not an essential component of the probable cause equation, no wrong of constitutional dimension occurred. However, respondent welcomes this opportunity to urge upon this court the proposition that whenever police officers are lawfully inside the premises, even private premises, they have the right to have with them their equipment whether it be in the form of flashlights, drug field testing units, sniffer devices, or sniffer dogs.

Respondent will concede at the outset that if the police officers unlawfully entered petitioner's motel room then the evidence seized was the product of an unlawful entry and suppressible under the law. On the other hand, if the police

acted lawfully in securing the premises until a search warrant could be obtained then the fruits of the search, pursuant to the search warrant were properly held to be admissible. It is respondent's position that not only did the concerned officers act properly in entering and securing the premises but if they did so lawfully then the presence of the sniffer dog, Luke, was also lawful. If the police officers had a legal right to be where they were at the critical point in time then Luke's smelling air around the suitcases was lawful because sniffing of the air by the dog is not a search. Further to this, the search warrant that was issued was also sustainable even if there had been no mention of Luke and his educated nose in the affidavit that supports the search warrant. There was adequate basis for the issuance of the search warrant based upon what the police officers already knew, without Luke's help.

The law of Florida permits even an unannounced intrusion into any building, including a private home, where those within are already aware of the presence of someone outside and are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is likely to be attempted. Benefield v. State, 160 So.2d 706, 710 (Fla. 1964). Such was the case here. Warrantless entries into private homes are permissible under extigent circumstances. Jones v. State, 447 So.2d 570 (Fla. 1983). See also Arango v. State, 411 So.2d 172 (Fla. 1982), cert. denied, 457 U.S. 1140, 73 L.Ed.2d 1360 (1982).

Once the officers had disarmed petitioner and ascertained that there were no other persons in the motel room they were at an important juncture. If they had then proceeded to search the premises, any fruits of the search would have been

unlawfully obtained and inadmissible into evidence. Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970). But this they did not do and the dicta in Vale supports the proposition that under extigent circumstances premises may be secured by the concerned officers until a search warrant can be obtained. In Vale, the search was ruled unlawful because the court held that after the officers entered the house and had satisfied themselves that there was no one in the house they should not have proceeded to search the premises without a warrant. Again, that is not what happened here. The officers did not proceed to search but froze the premises, as it were, and sent one of their number out to procure a search warrant based upon what the officers knew at that particular point in time. It is uncontraverted that Detective C. L. Porter, who had done the original mobile surveillance of Munoz, was by this

time, cognizant as to all of the details of this matter as learned from Detective Boney relative to the aborted cocaine sale and the arrest of Munoz and his companions. Respondent will show that if the police officers had a legal right to be in room 154, under the circumstances, the air around petitioner's suitcase was not a protected area. It is in the contents of the suitcase that there is a reasonable expectation of privacy, not in the air surrounding it.

In United States v. Solis, 536 F.2d 880 (9th Cir. 1976), the court noted that there is a split in authority as to whether sniffing, per se, constitutes a search at all. But even if it is a search it may be one that is reasonable under the circumstances. In Solis, the dog's handler had a legal right to be where he was at the time the dog alerted to the presence of cocaine and that the sniffing, if it was a search,

was not a prohibited search. The court further noted that dogs, because of their keen olfactory senses, have long been used to assist police in search and rescue missions, as well as in guard duty. Detection of contraband is a similar and related task. As in Solis, the method used in the instant case was inoffensive. There was no embarrassment to, or search of the person. Id. at 882-883.

Petitioner quotes from Judge Reinhardt's emotional condemnation of the use of "large police dogs to come into our homes and do whatever large police dogs do" as expressed in his concurring opinion in United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985). Although the record is silent as to Luke's pedigree he might well have been an amiable little beagle of the type used at many airports, especially in Europe, because of their small size and ability to enter narrow spaces. Even the

tracker dogs used in the antebellum south to ferret out runaway slaves were probably bloodhounds, known more for their mournful baying on a fresh trail than for their ferocity. Be that as it may, in the case sub judice, armed, uniformed police officers had already entered petitioner's motel room. Petitioner himself, it appears, was, at that time, an officer of the Miami Police Department, armed with an ankle holster and no doubt already familiar with the role of Alsatian shepherd dogs used for crowd control by his own department. By the time Luke arrived the premises had been secured and it is highly unlikely that Luke, the trained drug detection dog, inspired much terror in the heart of Jose Lopez, trained police officer and cocaine trafficker. Respondent submits that petitioner's quote from Judge Reinhardt's concurring opinion is, for our

purposes here, rhetoric, pointless and inane.

The Second Circuit held in United States v. Bronstein, 521 F.2d 459 (2nd Cir. 1979) that canine surveillance conducted in a public airline terminal is not a "search" within the protection of the Fourth Amendment. Certainly, in that case, the dog's handler had a legal right to be where he was at the time he commanded the dog to sniff the defendant's luggage. Likewise, in the case sub judice the dog's handler and his fellow officers had a legal right to be where they were for the purpose of securing the premises pending the issuance of a search warrant. In the instant case there was no additional intrusion by the dog and the contents were not exposed prior to the arrival of the search warrant. The Bronstein court noted:

> What a person knowingly exposes to the public, even in his own home or office, is not a sub-

> ject of Fourth Amendment protection. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); and, see, United States v. Johnston, supra, 497 F.2d at 398. (emphasis added)

In footnote 3 at page 462, the Bronstein court further noted that the use of certain "sense enhancing" instruments to aid in the detection of contraband does not constitute an impermissible Fourth Amendment search. The court cited a number of cases that involved the use of a boat searchlight, and binoculars. But see United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981) holding that a dog sniff is not a search.

The movement of petitioner's suitcase from the bathroom to the living room where it was mixed with several other (empty) suitcases brought in by Officer Deel, in order to facilitate the sniffing, does not amount to a Fourth Amendment seizure and the action of Luke's nose was not a search

protected by the Fourth Amendment. "One's legitimate privacy interest in his personal luggage concerns its contents, not its exterior." State v. Goodley, 381 So.2d 1180, 1182 (Fla. 3rd DCA 1980), citing United States v. Chadwick, 433 1, 14, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538, 550, n.8 (1977). Movement of a suitcase from a baggage cart to the floor, to facilitate the sniff, is a de minimis intrusion certainly not amounting to a seizure. State v. Mosier, 392 So.2d 602 (Fla. 3rd DCA 1981). See also Mata v. State, 380 So.2d 1157 (Fla. 3rd DCA 1980); United States v. Fulero, 162 U.S.App.D.C. 206, 498 F.2d 748 (D.C. Cir. 1974).

Respondent is aware of this court's holdings in Arizona v. Hicks, 480 U.S. _____, 94 L.Ed.2d 347 (1987) but Hicks is easily distinguishable. In that case the police officer's movement of stereo equipment in order to obtain the serial numbers

during an unrelated warrantless search of an apartment was not accompanied by probable cause to believe the equipment was stolen. Therefore, respondent submits that the movement of the suitcase from the bathtub to the living room to facilitate Luke's inspection of same in a row with several empty suitcases is of no consequence here.

Respondent concedes that lawful entry for the purpose of securing the premises does not give the police license to search an entire building for evidence. United States v. Satterfield, 743 F.2d 827, 845 (11th Cir. 1984), cert. denied, 471 U.S. 1117, 86 L.Ed.2d 262 (1985). But the law is clear, however, that when officers reasonably believe that delay in checking the premises would endanger their lives or the lives of others they may conduct a security sweep. See e.g., United States v. Burgos, 720 F.2d 1520, 1526 (11th Cir. 1983). If officers spot evidence in plain

view during such a protective sweep, they may seize it. United States v. Standridge, 810 F.2d 1034, 1038 (11th Cir. 1987), cert. denied, _____ U.S. _____, 95 L.Ed.2d 877 (1987). See also United States v. Caraza, et al., 2 F.L.W.Fd. C466 (11th Cir. Case No. 86-5548, April 25, 1988).

Respondent urges that the information on which the search warrant was secured came from sources wholly unconnected with the entry and known to the officers well before the entry. In a case involving precisely this circumstance this Court held that, under such circumstances, the fruits of the search pursuant to the warrant were not derivative of illegality and not the "fruit of the poison tree." Segura, et al. v. United States, 468 U.S. 796, 82 L.Ed.2d 599 (1984). The Supreme Court of Florida followed Segura in deciding State v. Riley, 462 So.2d 800 (Fla. 1984) which turned on a similar point.

In the case sub judice, there was no search of anything until after the search warrant arrived. Petitioner apparently finds fault with the search warrant because the application included Luke's hit on the suitcase. Although respondent contends that such an objection would be meritless, even if it had merit, the officers acted in good faith based upon a facially valid warrant signed by a neutral and detached magistrate. This Court has held that when police officers act in objective good faith or their transgressions have been minor, inherently trustworthy tangible evidence obtained in reliance on such a warrant will not be suppressed. United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984). In State v. Bernie, 472 So.2d 1243 (Fla. 2d DCA 1985), a case involving a fatally defective warrant, the court applied the cost benefit approach of Leon:

> Exclusion of the cocaine would be improper because there is not police illegality and thus nothing to deter.

Id. at 1247.

Irrespective of Luke, all the officers needed was a valid search warrant for room 154. The suitcase need not have been listed as a place to be searched. The warrant limited the items to be seized to cocaine and that reference sufficiently limits the discretion of the executing officers. North v. State, 32 So.2d 915 (Fla. 1947); Carlton v. State, 449 So.2d 250 (Fla. 1984). A search warrant need not specify the precise location of the items to be seized within the premises. The designation of room 154 to be searched for cocaine substantially limits the area which the officers can search and the items for which the officers may search. Any suitcase, box or other container on the premises that could be used to conceal

cocaine could be searched pursuant to a warrant designating room 154 as the premises to be searched. Schrager v. State, 472 So.2d 896 (Fla. 4th DCA 1985).

CONCLUSION

The excellent police work that this case involved resulted in the seizure and forfeiture of eight kilograms of cocaine and the arrest of several cocaine traffickers from the Miami area. The evidence, as presented at the hearing, shows that the concerned officers followed a logical and lawful progression as to all the actions they took at any particular juncture. They took delivery of a kilo of cocaine from one Munoz, arrested him, searched him and recovered from his pocket the telephone number and the room number of a motel that was within approximately 15 minutes driving distance of the Ramada Inn in Jacksonville where the transaction took place. The sellers had advised the under-cover officers that the next increment of cocaine could be procured in approximately 30 minutes. The officers made a logical assumption that room 154 at the Scottish

Inn, Orange Park, Florida was the stash from which the first kilo of cocaine had come and that from which subsequent deliveries would be made. The circumstances under which the warrantless entry was made justified prompt entry and securing of the premises in accordance with standards already announced in numerous federal and state decisions dealing with this issue.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSE A. LOPEZ, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

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THE WARRANTLESS CANINE SEARCH OF PETITIONER'S PRIVATE PREMISES VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS

The propriety of the warrantless use of a drug sniffing dog following a warrantless entry into an individual's private premises is squarely before this Court. Although the State attempts to confuse this issue with subsidiary issues, which will be addressed later in this text, it is forced to acknowledge that the crucial issue in this case is the use of "Luke" to sniff petitioner's luggage prior to the issuance of a warrant. The State urges upon this Court, "... the proposition that whenever police officers are lawfully inside the premises, even private premises, they have the right to have with them their equipment, whether it be in the form of flashlights, drug field testing units, sniffer devices, or sniffer dogs" [Respondent's brief at 10] (Emphasis in original). While appellant disagrees with

the State's argument that the initial entry was legal, the lawfulness of the entry is irrelevant. Instead, this Court's inquiry should be whether the subsequent seizure, movement and dog search of the suitcase was lawful.

Indeed, in Arizona v. Hicks, 480 U.S. ___, 94 L.Ed.2d 347 (1987), this Court recently held that the lawfulness of an entry does not give police officers the right to conduct seizures of the items contained within. In Hicks, police officers entered an apartment, after shots had been fired, in order to look for shooters or their victims. Lawfully inside due to the exigency of the shooting, they noticed stereo equipment in plain view. They moved the equipment to locate serial numbers, which established that the equipment was stolen. A search warrant was thereupon obtained and the equipment seized.

In arguing the lawfulness of the

search, the State in Hicks, as in this case, argued that no search had occurred. This Court disagreed, stating:

> Officer Nelson's moving of the equipment, however, did constitute a 'search' separate and apart from the search for the shooter ...

Id. at 94 L.Ed.2d 353-354. This Court further held:

> ...[T]he distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches is much more than trivial for purposes of the Fourth Amendment ... A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

Id. at 354.

In the present case, petitioner's suitcase was moved from its concealed location in the bathtub to the living area of the motel room, where it was subjected to Luke's search. As in Hicks, the seizure of the suitcase herein "... exposed to view concealed portions of the apartment or its contents." Id. This is especially so in the instant case because none of the

officers could see the contents of the suitcase. Simply put, but for the movement of the suitcase to facilitate the dog sniff, none of the officers could have determined its contents short of physically opening it. Clearly the suitcase was seized when it was moved by the officers, detained for a number of hours and subjected to a canine search prior to the issuance of a search warrant. See also United States v. Place, 462 U.S. 696, 707 (1983) (90 minute detention of luggage awaiting canine sniff unreasonable, this Court noting, "We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.").

The action of the police officers herein is thus in direct contrast with the actions of the officers in Segura v. United States, 468 U.S. 796 (1984), and the State's reliance on Segura is misplaced. In Segura, the defendants were arrested and

their apartments secured awaiting the issuance of a search warrant. As noted by this Court, a warrant was subsequently obtained based, "... wholly on information known to the officers before the entry into the apartment ..." Id. at 799 (emphasis added). In upholding the subsequent search, this Court specifically noted that the information contained in the warrant was completely unrelated to the entry and therefore constituted an independent source for the evidence. There was no such independent source in this case. Of more significance, this Court in Segura explicitly noted, "There is no evidence that the agents in any way exploited their presence in the apartment; they simply awaited issuance of the warrant ." Id. at 812 (emphasis added). In contrast, officers in the present case used their entry to facilitate a canine search before they sought a warrant. The reasoning of Segura does not stand for the proposition

that officers of the State can enter an apartment, subject a locked suitcase to a canine search without the benefit of a warrant and then obtain a warrant based upon their warrantless actions within the premises.

The State also argues that it had probable cause apart from Luke's search to support the issuance of the search warrant herein. This argument must fail for several reasons. First, although it argues such cause, it fails to articulate it. The State would have this Court believe that the police knew where additional cocaine was located after Munoz's arrest. They did not. No surveillance ever placed Mr. Munoz at petitioner's motel. Nor was there any evidence that petitioner and Munoz had been together prior to the arrest of Munoz. The only thing that the police had was a piece of paper with a phone number written on it. The State would equate this information with probable cause to believe petitioner was possessing cocaine. It concedes as

much in its brief when it states, "The officers made a logical assumption that room 154 at the Scottish Inn ... was the stash [sic] from which the first kilo of cocaine had come and that from which subsequent deliveries would be made." [Respondent's brief at 26] (emphasis added). "Logical assumptions" do not constitute probable cause.

Additionally, although the State argues that the police "could have" obtained a warrant without the information derived from Luke, the fact is they did not. Contained within the affidavit in support of the warrant was the statement, "Your affiant also requested that Officer B.L. Deal of the Jacksonville Sheriff's Office bring his certified drug dog to said room number 154. Said dog positively alerted Officer B.L. Deal that said suitcase contained an illegal narcotic substance." The fact of the canine search and its results therefore were directly

communicated to the judge who issued the search warrant.

Given these facts the State cannot show that information gained from the illegal entry did not affect either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. Murray v. United States , ___ U.S. ___, 43 CrL 3169, 3171 (June 27, 1988). In Murray, this Court recently held that the later seizure must be "genuinely independent" of the earlier illegal one in order to be lawful. Id. at 43 CrL 3170 (emphasis added). No such independence has been established by the State in this cause.

Finally, the State's muddled discussion as to the type of dogs utilized to conduct the search is irrelevant. The warrantless use of any pedigree dog to search private premises may not be of concern to the respondent, but it has been a matter of grave concern to every court

which has addressed the issue. See e.g., United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), and United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985). In this respect the words of one Florida judge are wisely heeded:

> Judicial decisions which violate individual rights in order to "get tough on drugs" are neither an answer to individual responsibility nor a democratic method of dealing with individual rights.

Hunter v. State, 518 So.2d 304, 307, (Fla. 4th DCA 1987)(J. Glickstein, concurring) (emphasis added).

The implications of the police conduct herein are frightening. If the decision below is not reviewed, this Court implicitly will approve the police practice of entering a home without a warrant and subjecting the contents therein to a canine search, unhindered by the requirements of the Fourth Amendment to the United States Constitution. The warrantless use of Luke within petitioner's premises "... constituted a search, a grossly

unreasonable one, and a flagrant violation ... [petitioner's] rights under the Fourth Amendment." DiCesare, at 903 (J. Reinhardt, concurring). Surely, our Fourth Amendment provides protection from such conduct.

CONCLUSION

The decision below is in direct conflict with the decision of the two federal courts of appeal which have reached the merits of the issue before this Court. In addition, the issue presented is one of constitutional significance which should be resolved by this Court. For the foregoing reasons this Court should accept jurisdiction in this cause.

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